

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77-4057

In the
UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

MCI TELECOMMUNICATIONS CORP, et., al.,

Intervenors

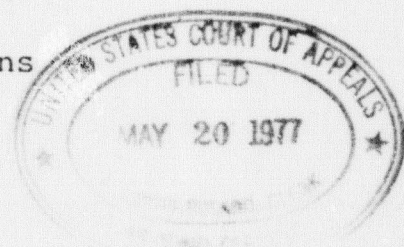
PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR

UTILITIES TELECOMMUNICATIONS COUNCIL

Charles M. Meehan
Keller & Heckman
1150 Seventeenth Street, N. W.
Washington, D. C. 20036

Attorney for Intervenor
Utilities Telecommunications
Council



May 18, 1977

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PRELIMINARY STATEMENT

In the proceeding below the Federal Communications Commission (Commission) found that existing tariff restrictions on the resale and shared use of private line services of communications common carriers to be unlawful and ordered their elimination. The Commission also found that certain other "single customer" tariff provisions, including that which treated electric utilities interconnected into a power pool as a "single customer" for purposes of providing communications between the members of the power pool to coordinate and exchange electrical pooled power, were unreasonably discriminatory and unlawful and ordered their elimination. The unlimited sharing which would be permitted by removal of all restrictions on sharing of private line services should permit electric utilities interconnected into power pools to continue to achieve the same type of intercommunications they have previously achieved under the "power pool" single customer tariff provision. This action will also permit electric, gas and water utilities to engage in sharing arrangements of private line services not previously available to them. This Brief will demonstrate why this Court should reverse the Commission's findings as to the "power pool" single user provision, if this Court finds the action of the Commission with respect to providing for unlimited sharing was in error or unlawful.

ISSUES PRESENTED

The issues presented by the removal of all restrictions on sharing of private line services include:

- o Whether the Federal Communications Commission's order eliminating restrictions on resale and shared use of communications common carriers services and facilities was adopted pursuant to proper procedural requirements under the Administrative Procedure Act, and the Communications Act of 1934, as amended?

- o Whether the Commission was acting within the mandate of its statutory authority in eliminating all restrictions on sharing?

- o Whether the Commission's finding that sharing is not common carriage is legally sustainable, and whether adequate safeguards were provided in order to assure that sharing would not become common carriage?

These issues are being exhaustively briefed by the Respondent Commission and by other Intervenor^{1/} also supporting the Commission's decision to eliminate the restrictions on sharing and no useful purpose would be served by Intervenor Utilities Telecommunications Council (UTC) also discussing these issues. To avoid redundant briefing, UTC

^{1/} See, for example, Brief of Intervenor, American Petroleum Institute.

will confine its Brief to an issue which should also be decided by this Court in the event this Court finds that the Commission exceeded its authority or was in error in finding the restrictions on sharing to be unlawful and in ordering their elimination.

This issue is:

o Whether the Commission erred in finding the "power pool" single customer provision to be unlawfully discriminatory and in ordering its elimination?

COUNTERSTATEMENT OF THE CASE

A. Proceedings Before the Commission

The Commission initiated the proceeding in Docket 20097, by a Notice of Inquiry and Proposed Rule Making 47 F.C.C. 2d 644 (1974), (J.A. 12) to investigate whether and under what conditions subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, how the Commission should regulate such resale and shared use. The Commission also inquired as to whether the "single user" provisions, including that for power

pools, constituted an unreasonable discrimination. (J.A. 20-21).^{2/}

Intervenor UTC participated in that proceeding by filing Comments (J.A. 374) and Reply Comments (J.A. 1144). These filings showed that since utility operations are becoming more complex and interrelated, such as the interconnection of electric utility systems into so-called "power pools", there is a growing requirement for intercommunications among utilities concerning the mutual operation of their utility systems. This has resulted in increased intercommunications over the existing private microwave and other utility-owned communications systems, as well as over leased private line circuits. (J. A. 376). The need for intercommunications among utilities, be they electric, gas or water, and whether this communications is over utility-owned communications facilities or leased circuits, arises because of the need to communicate for the more efficient mutual operation of the utility systems involved. Such intercommunications is essential, in effect, to the

^{2/} The "power pool" single customer provision, Section 2.2.1 f) of AT&T's FCC Tariff 260 reads as follows:

"Where the use of the service relates to coordination or exchange of electrical pooled power, for the transmission of communications between any two or more stations of such service or similar services furnished to others who are parties to the coordinating or exchange arrangement."

more reliable and more economic operation of the utility system and in providing reliable utility service to the public. UTC also pointed out that tariff provisions, such as the "power pool" provision, which enhance the ability of utilities to intercommunicate, directly benefit the public in the form of better communications for the utilities with a resultant improvement in the reliability of utility service to the public. (J.A. 378).

UTC's Comments stressed that the "power pool" single customer provision is essential to provide those electric utilities which have interconnected their electrical systems into a "power pool" with the ability to design, configure, order and administer in the most efficient manner those leased circuits which they must utilize for the mutual control and operation of the interconnected electric utility systems. UTC emphasized that the use of this single customer provision is confined specifically to that type of intercommunication among electric utilities which is necessary for the mutual control of the interconnected electric system. (J.A. 384). It cannot be used for other traffic, such as that relating to the non-power pool operations or business of the utilities. UTC specifically called to the Commission's attention the fact that this tariff provision was included in the tariffs to eliminate the serious situation which previously existed prior to the adoption of this tariff

provision whereby the engineering and the ordering of new multi-point facilities between members of a power pool was so complicated that service dates could not be met. (J.A. 385).

In their Comments, certain of the so-called "specialized common carriers" argued that the "single customer" provisions were nothing more than a means of accomplishing "sharing" of common carrier private line facilities, thereby enabling the group of users involved to achieve bulk rate preferences and as such were unreasonably discriminatory. (See, for example, Comments of Data Transmission Company, J.A. 691-696). In its Reply Comments, UTC specifically refuted these allegations by pointing out that the "power pool" provision simply permits a single entity, such as the Power Pool Center, to order the circuits needed by the constituent members of the power pool to intercommunicate with each other concerning the coordination and exchange of electric power to meet the public's demands. UTC stressed that these are parties "intercommunicating" or talking to each other over the same circuit concerning a matter of mutual concern (transferring of electricity). It does not involve, UTC emphasized, two or more parties "sharing" the same circuits for traffic with third parties which relates

to subjects which are exclusively for each "single user" party's own benefit. UTC pointed out that it is not proper, therefore, to equate the use of the "power pool" single customer provisions with "sharing" in the sense that users in other "single customer" groups are able to "share" and thereby take advantage of bulk rate preferences. (J.A. 1150-1151). None of the Comments or Reply Comments of other parties presented any facts to refute UTC's showing that the "power pool" single customer provision was not used for "sharing" resulting in bulk rate preferences. In fact, there is no evidence that the electric utilities used, or ever can use, the "power pool" single customer provision to "share" private line circuits to achieve bulk rate preferences.

B. The Commission's Report and Order

In Appendix E to its Report and Order, 60 F.C.C. 2d 261 (J.A. 127-140), the Commission observed, at paragraph 1 (J.A. 128), that the "power pool" single customer provision is denoted in Section 2.2.3 of AT&T's FCC Tariff No. 260 as an exception to the resale and third party traffic prohibition of AT&T's tariff,^{3/} even though no intermediary is mentioned as the "customer." The Commission went on

^{3/} That provision reads:

2.2.3 Private line service shall not be used for
(Continued next page.)

to imply that this was unusual since all other "single customer" provisions identify the customer and the scope of the resale activity which can be undertaken by the customer. In contrast, the Commission remarked, the "power pool" provision focuses only on the user group's identity and specifies the uses for which private line service is available. (J.A. 128).

The Commission then goes on at paragraph 2 of Appendix E (J.A. 128-129) to conclude that while the single customer provisions can be viewed as exceptions to the resale and third party prohibitions, they may be simultaneously viewed as exceptions to the shared use restrictions on AT&T's private line services, specifically the prohibition on sharing of services provided over discrete wideband facilities and the virtual prohibition on sharing of Series 5000 (Telpak) service. The Commission further concluded that a user group

3/ (Cont.) any purpose for which a payment or other compensation shall be received by either the customer or any authorized or joint user, or in the collection, transmission, or delivery of any communications for others, except as provided in 2.2.1(F), 2.2.1(G) and 2.2.1(J) preceding. This provision does not prohibit an arrangement between the customer and the authorized or joint users to share the cost of the private line service, nor does it prohibit the use of Type 2006, 5206 or 8206 channels by a communications common carrier in the rendition of a public telegram message business. (J.A. 251.) (Emphasis added.)

obtaining private line service through an intermediary owned in some manner by the user group may be viewed as engaging in a sharing arrangement through an intermediary. The Commission noted that a primary advantage of such sharing through an intermediary is that it allows specified user groups--such as the airlines, stock exchange members, and electric power pools--to enjoy the administrative convenience resulting from the purchase of communications services in conjunction with other members of the user group. It also observed that a further advantage to single customer status is that it allows user groups who are accorded such status by AT&T to aggregate their communications needs--both as to communications among group members and as to communications within a single member's operation--thereby making the purchase of Series 5000 services economically feasible. Thus, the Commission reasoned that certain user groups, because of their single customer status, are allowed to order communications services under Telpak discount rates, which would not be available to the users taken singly (J.A. 129). The Commission did note, however, that Composite Data Service Vendors (CDSV's) are the only single customers precluded by the AT&T private line tariff from ordering Telpak service. See FN8, paragraph 2 of Appendix E. (J.A. 129.)

The Commission observed at paragraph 5 of Appendix E (J.A. 132), that single customer status cannot be separated from the rate advantages accruing to an entity or group accorded this status, and goes on to find that members of single customer user groups enjoy the "discount" by being able to aggregate their communications needs and thus justify subscribing to Telpak which is priced lower than a like (or smaller) quantity of private line circuits ordered separately. The Commission concludes, at paragraph 12 of Appendix E (J.A. 138), that the statutory objective of promoting the safety of life and property through the use of wire and radio communications does not alone justify otherwise unlawfully discriminating rates. The Commission found, at paragraph 16 of Appendix E (J.A. 140) that the single customer provisions are unlawfully discriminatory.

ARGUMENT

A. Summary

The Commission's finding that all single customer provisions, apparently with one exception,^{4/} are unlawfully

^{4/} At FN 3a to paragraph 1 of Appendix E (J.A. 128), the Commission found that the "corporate conglomerate" single customer provision (Section 2.2.1(C) of AT&T's FCC Tariff 260) was not unlawfully discriminatory. The "corporate conglomerate" provision reads as follows: (Continued next page.)

discriminatory was overbroad and, at least as to the "power pool" single customer provision, was not supported by reasoned findings. The Commission erroneously concluded, without any factual basis and in the face of contradictory evidence, that all single customer provisions, including the "power pool" single customer provision, resulted in groups of users being able to "share" circuits for the purpose of aggregating circuits to take advantage of the rate discounts of Telpak. Unlike practices under other "single customer" provisions, there is no evidence in the record that the electric utilities have used, or even can use, the "power pool" single customer provision to secure Telpak rates. In fact, the only evidence in the record as to the electric utilities' use of the "power pool" single customer provision, UTC comments and Reply Comments, was contradictory and demonstrated that the provision is not used to "share"

4/ (Cont.) "For the transmission of communications relating directly to the business of a subsidiary corporation over which the customer exercises control through ownership of more than 50% of the voting stock."

Ironically, under this provision, a member of the corporate single customer group can and, does aggregate circuits to take advantage of Telpak. However, such a provision is essential to avoid discrimination against corporations which either choose, or are required, to organize themselves under a "parent-subsidary" corporate structure. (For full discussion of justification of "corporate conglomerate" provision, see UTC Comments at (J.A. 382-384.)

circuits to secure Telpak rates. Rather, it is used to provide a more efficient means of engineering and ordering, in a timely and orderly fashion, the circuits needed by electric utilities in a "power pool" for purposes of talking to each other concerning the mutual coordination, control and exchange of electric power to enhance the reliability of electric service to the public. While administrative (and reliability) benefits may flow from such arrangements to the utilities and the public, there is no evidence in the record that this provision also results in rate preferences for the electric utilities. Certainly, the Commission's statutory objective of saving life and property through the use of wire and radio communication justifies these administrative and reliability benefits. Furthermore, the Commission's own analysis of the language of the provision tends to support a finding that the "power pool" provision is not intended to afford the members of the group with the ability to "share" circuits in a manner that would provide them with rate preferences because, unlike all other "single customer" provisions, no intermediary (customer) is specified. Also, unlike the other "single customer" provisions, there is no indication as to the scope of any resale or sharing, which could imply that such is not permitted.

B. The Commission's Finding That the Power Pool Single Customer Provisions Result in Unlawfully Discriminatory Rate Preference is in Error Because It is Not Supported By Any Evidence in the Record

1. Legal Principles Involved

The grounds upon which the Commission based its finding that the "power pool" single customer provision was unlawful must be clearly disclosed and adequately sustained. SEC v. Chenery Corp., 318 U.S. 80, 94 (1943). Such an essential element of the Commission's decision as the finding that the "power pool" provision enabled electric utilities to secure bulk rate preferences must be supported by substantial evidence. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968). The Commission must provide the basic facts by which it reached its conclusion that the "power pool" provision resulted in unlawfully discriminatory rates for the electric utilities. Hawaiian Telephone Co. v. FCC, 498 F.2d 771, 777 (D. C. Cir. 1971). The Commission's discussion of how this unlawful preference arises must be based upon facts, not a recital of conclusions with little supporting rationale. Pillai v. CAB 485 F.2d 1018, 1027 (D. C. Cir. 1973). If this Court determines that the facts confronting the Commission do not rationally support its ultimate conclusion as to the unlawfulness of the "power

pool" single customer provision, the Commission's findings concerning that provision should be reversed, Columbia Broadcasting System, Inc. v. FCC 454 F.2d 1018, 1029 (D. C. Cir. 1971). In making its determination this Court should look to the record as a whole, including evidence contradictory to the finding of the Commission such as UTC's Comments and Reply Comments which specifically refuted allegations that the "power pool" provision resulted in "sharing" for bulk rate preference purposes. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 493 (1951).

2. Application of Legal Principles to Commission's Action

It is obvious that the sole basis for the Commission's finding as to the unlawfulness of the "power pool" single customer provision is the erroneous and unsupported assumption the the electric utilities, like users of some other "single customer" provisions, use this provision to "share" private line circuits in a manner whereby they are able to aggregate circuits to take advantage of Telpak rates. This assumption as to the "power pool" provision is not based upon any facts in the record concerning the electric utilities' use of the provision which would even tend to show that the electric utilities use that single customer provision to achieve rate preferences. Rather, the Commission's finding is based

only upon speculation and assumptions drawn from practices under other single customer provisions such as that used by the airline industry. Pillai v. CAB, supra. The Commission has failed to set forth any facts as a basis for its findings as to the unlawfulness of the "power pool" provision and has, therefore, failed to support its finding with substantial evidence. SEC v. Chenery Corp., supra; Permian Basin Area Rate Cases, supra; Hawaiian Telephone Co. v. FCC, supra. In fact, the only evidence in the record concerning the electric utilities' use of the "power pool" provision is contradictory to the Commission's finding. The UTC Reply Comments made it clear that the electric utilities use of this provision is not a situation where the utilities "share" circuits for each user's own traffic, as is the case where circuits are aggregated for purposes of taking advantage of Telpak rates. Instead, the UTC Comments and Reply Comments, which are unrefuted, demonstrated that the "power pool" provision is used so that members of a power pool can secure, in a timely and efficient fashion, the circuits needed to talk to each other--to intercommunicate--concerning the mutual exchange of electric power.

The Commission's own analyses of the language of the "power pool" provision even supports a finding that it is designed and used for administrative convenience in

engineering and ordering circuits and not for purposes of aggregating circuits through "resale" or "sharing." The Commission notes (J.A. 128) that this "power pool" provision is not like all the other single customer provisions in that it fails to specify the "customer" and the scope of the "resale" activity that can be undertaken but only identifies the group and the uses (power pool traffic) for which the service is available. UTC suggests that the reason for this difference is that the provision was never designed or intended to cover a situation where an intermediary or "customer" could aggregate a large number of circuits through "resale" or "sharing" among the members of the group for purposes of obtaining rate preferences. UTC further suggests that the reason the "power pool" provision, unlike other single customer provisions, does not discuss the scope of resale or "sharing" permitted, is that the provision was never intended to cover resale or sharing by the electric utilities in the sense of aggregation of circuits for bulk rates. It is submitted that the reason the "power pool" provision is listed as an "exception" to Section 2.2.3 of AT&T's FCC Tariff 260 is not to provide an exception to the resale (or "sharing") prohibition, but rather, only an exception to the prohibition as to third

party traffic to permit the Power Pool Center to engineer and order the circuits used by the members of the power pool to talk to each other concerning the exchange of electric power.

There is no doubt that the "power pool" single customer provision confers what could be described as "administrative benefits" on the members of power pools. It enables them to avoid the previous situation whereby the engineering and ordering of multi-point private line service among the members of the pool became so complicated that service dates could not be met. The primary "benefit" of the provision is that it has enhanced the reliability of power pool communications which, in turn, enhances the reliability of electric service to the public served by the members of the power pools. This is a real benefit in terms of saving of life and property of the electric utility customers. Also, here, as was the case in 1959 when the Commission confined the "sharing" of private microwave systems to arrangements among governmental entities, right-of-way companies and rate regulated entities, "it is evident that any economic benefits flowing out of such arrangements will assuredly flow directly back to the public, either as taxpayers or ratepayers." Allocation of Frequencies

in the Bands above 890 MC, 27 F.C.C., 359, 408 (1959) reconsideration denied, 29 F.C.C. 825 (1960).

While the Commission's statutory objective of saving of life and property through the use of wire and radio may not justify unlawfully discriminatory rates (which, UTC submits, do not flow from the "power pool" provision), the objective does justify the so-called "administrative benefits" which that provision provides the members of electric power pools and the public they serve.

C. Remedy Options

For reasons discussed above, it is clear that there was not a sound basis for the Commission's finding as to the unlawfulness of the "power pool" provision. If the decision to permit unlimited sharing is sustained, the electric utilities may be able to attain the same goal through "sharing" arrangements and the adverse effects of the Commission's erroneous decision would probably be mooted. However, if this Court reverses the Commission on unlimited sharing, it should also reverse the Commission's findings on the unlawfulness of the "power pool" single customer provision so that the power pools will still be able to secure the type of private line service they need for electric system reliability.

Even if the Commission is sustained on unlimited sharing, it will not be known for certain until the new tariffs become effective whether the new "sharing" tariff provisions will provide the power pools with the service they need. Thus, if the Court agrees with UTC that the Commission was in error in its finding as to the "power pool" provision, consideration should still be given to reversing the Commission on its "power pool" provision finding and remand that portion of the decision for further consideration by the Commission. Thus, the electric utilities in power pools could meet their requirements under that single customer provision, and all utilities could meet their regular "sharing" requirements under the general sharing provisions. If there is concern on the part of the Commission over the electric utilities using such a provision to aggregate circuits and achieve bulk rate preferences (assuming bulk rates are, in fact, available), the Commission's concerns could be alleviated by ordering the carriers to modify the "power pool" provision to prohibit power pools from ordering bulk rate service under that provision, as was done with the CDSV's. (J.A. 129).

CONCLUSION

For the reasons discussed herein, Intervenor UTC respectfully requests the Court to reverse the Commission's Orders to the extent they find the "power pool" single customer provision to be unlawful, especially if this Court reverses the Commission's Orders as to the legality of unlimited sharing of private line service.

Respectfully submitted,

Charles M. Meehan
Keller & Heckman
1150 Seventeenth Street, N. W.
Suite 1000
Washington, D. C. 20036
Telephone: (202) 457-1138

Attorney for
Utilities Telecommunications
Council

May 18, 1977

CERTIFICATE OF SERVICE

I, Charles M. Meehan, a member of the bar of this Court, hereby certify that the foregoing "Brief of Intervenor Utilities Telecommunications Council" was served this 18th day of May, 1977, by mailing true copies thereof, U.S. mail, postage prepaid, to the following persons at the addresses shown below:

Werner K. Hartenberger, Esq.
John E. Ingle, Esq.
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

The Honorable Griffin Bell
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Joel Grant, Esq.
Robert B. Nicholson, Esq.
John J. Powers, III, Esq.
Department of Justice
Appellate Section
Washington, D.C. 20530

Herbert E. Marks, Esq.
Stephen R. Bell, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006
Attorneys for Remote Processing
Service Section of ADAPSO, Inc.

Jeremiah Courtney, Esq.
Arthur Blooston, Esq.
2120 L Street, N.W.
Washington, D.C. 20037
Attorneys for American Trucking
Associations, Inc.

Michael H. Bader, Esq.
Kenneth A. Cox, Esq.
William J. Byrnes, Esq.
Raymond C. Fay, Esq.
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
Attorneys for MCI Telecommunications,
Corp., and Microwave Communications,
Inc.

James E. Landry, Esq.
1709 New York Avenue, N.W.
Washington, D.C. 20036
Attorney for Air Transport Association
of America

Charles R. Cutler, Esq.
John L. Bartlett, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Aeronautical Radio,
Inc.

Mahlon M. Frankhauser, Esq.
Michael Yourshaw, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Securities Industry
Automation Corp.

J. Roger Wollenberg, Esq.
David R. Anderson, Esq.
William T. Lake, Esq.
Wilmer, Cutler & Pickering
1666 K. Street, N.W.
Washington, D.C. 20006

- and -

Ronald S. Rolfe, Esq.
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
Attorneys for International Business
Machines Corp.

Charles Lister, Esq.
888 16th Street, N.W.
Washington, D.C. 20006

- and -

Alfred A. Green, Esq.
J. Robert Fitzgerald, Esq.
195 Broadway
New York, New York 10007

- and -

Edgar Mayfield, Esq.
Post Office Box 32
Room 4B-112
Bedminster, New Jersey 07921
Attorneys for American Telephone and
Telegraph Company

Thormund A. Miller, Esq.
Richard S. Kopf, Esq.
James M. Tobin, Esq.
Southern Pacific Building
One Market Plaza
San Francisco, California 94105

- and -

Howard G. Kristol, Esq.
Reboul, MacMurray, Hewitt, Maynard
& Kristol
75 Rockefeller Plaza
New York, New York 10019
Attorneys for Southern Pacific
Communications Company

Robert S. Potter, Esq.
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10020
Attorney for Dow Jones & Company,
Inc.

John R. Baskin, Esq.
Baker, Hostetler & Patterson
1956 Union Commerce Building
Cleveland, Ohio 44115
Attorney for United Press International,
Inc.

Aloysius B. McCabe, Esq.
Michael Yourshaw, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for American Newspaper Publishers
Association, The Associated Press
and Commodity News Service, Inc.

Larry S. Solomon, Esq.
Keller & Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
Attorney for American Petroleum Institute

Philip M. Walker, Esq.
1050 17th Street, N.W.
Washington, D.C. 20036

- and -

Donald E. Ward, Esq.
1050 17th Street, N.W.
Suite 840
Washington, D.C. 20036
Attorneys for Telenet Communications
Corp.

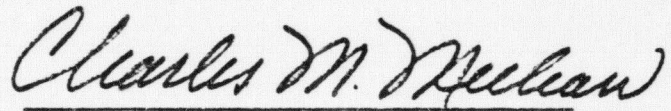
Joel Yohalem, Esq.
James L. Winston, Esq.
1828 L Street, N.W.
Washington, D.C. 20036
Attorneys for Western Union Telegraph
Company

Edward P. Taptich, Esq.
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036
Attorney for Graphic Scanning Corporation
and Graphnet Systems, Inc.

Joseph M. Kittner, Esq.
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036
Attorney for Computer and Business
Equipment Manufacturers Association

Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006
Attorneys for Western Union International,
Inc.

May 18, 1977


Charles M. Meehan